Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1911

COMMONWEALTH OF PENNSYLVANIA,

vs.

FREDERICK RUTH,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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CONSTITUTION.

United States Constitution:
Sixth Amendment 2,5
Fourteenth Amendment 2,3,5

IN THE

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No. _____

COMMONWEALTH OF PENNSYLVANIA,

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FREDERICK RUTH,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, Frederick Ruth, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Superior Court of Pennsylvania entered in this matter on 7 December 1979.

I. Opinion Below

The Opinion of the Superior Court dated 7 December 1979, is not yet reported, but is reproduced in the Appendix hereto. The Order of the Supreme Court of Pennsylvania dated 14 April 1980 denying Petition for Allowance of Appeal is not yet reported, and the docket entries of said Court reflecting same are reproduced in the Appendix hereto.

II. Jurisdiction

The Order of the Supreme Court of Pennsylvania denying Petition for Allowance of Appeal was entered on 14 April 1980, and accordingly, the instant Petition is being timely filed. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1257(3).

III. Question Presented

Was Petitioner denied the effective assistance of counsel in contravention of his right to such counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution?

IV. Constitutional and Statutory Provisions

Amendment VI—Jury Trial for Crimes and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

Amendment XIV—Searches & Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to searched, and the persons or things to be seized.

28 U.S.C. §1257(3)—Certiorari

Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

> (3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constititution, treaties or statutes of, or commission held or authority exercised under, the United States.

V. Statement of the Case

Petitioner was arrested on May 1, 1976, charged with conspiracy, allegedly involving a narcotic transaction between an undercover police officer and an unindicted co-conspirator.

The matter was brought to trial on March 22-24, 1977, before the Honorable Forrest G. Schaeffer, Jr., and a jury and Petitioner was found guilty as charged above.

Following the denial of post trial motions, Petitioner was sentenced on August 24, 1978, to a term of imprisonment of four to eight years in the State Correctional Institution.

An appeal was timely filed with the Superior Court of Pennsylvania, which Court affirmed the judgment of the lower Court, *per curiam*, on December 7, 1979. A timely Petition for Allowance of Appeal was filed in the Supreme Court of Pennsylvania, which Petition was denied on 14 April 1980.

The instant Petition follows:

VI. Reasons for Granting the Writ

It is well established that an accused has a constitutionally-based right to the effective assistance of counsel. *McMann vs. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.E.2d 763 (1970). In the instant case, that right was abrogated when, during post-trial motions, trial counsel failed to allege as error the failure of the Trial Court to charge the jury that mere presence at the scene of a crime and knowledge of the commission thereof is insufficient to support a conspiracy conviction.

Under controlling Pennsylvania law, it is clear that the Trial Court is obligated upon request to illuminate all relevant legal issues for the jury, which issues are presented by facts in evidence. *Commonwealth vs. Moore*, 463 Pa. 317, 344 A.2d 850 (1975). Where an accused is prejudiced by the Court's refusal of a tendered point for charge, a conviction must be reversed. *Commonwealth vs. Stolzfus*, 462 Pa. 43, 337 A.2d 873 (1975).

In the case at bar, the Trial Court refused to charge the jury on a point which it was clearly required to charge. The failure of trial counsel to assign this omission as error in post-trial motions prejudiced Petitioner by removing from the Court's consideration one issue which could have resulted in an acquittal. As such, Petitioner was denied the effective assistance of counsel in derogation of his Sixth and Fourteenth Amendment rights.

VII. Conclusion

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court below.

Respectfully submitted:

LEE MANDELL,
Attorney for Petitioner.

APPENDIX

No. 11 E. D. Misc. Docket 1980

COMMONWEALTH OF PENNSYLVANIA,

v.

FREDERICK RUTH,

Petitioner.

Court Below: C.P.—Criminal
County: Berks
No. Below: 76-128001

Attorneys for Petitioner: Lee Mandell, 1525 Robinson Building, 45 S. 15th Street, Phila., Pa. 19102, 563-3395.

Attorneys for Respondents: Office of District Attorney, Berks County, Court House, Reading, Pa. 19601.

1/4/80—P.A.A. from Superior Court at No. 2314 October Term 1978, filed.

1/10/80—Record, filed.

4/14/80—ORDER: Denied. B.T.C.

4/24/80—Record remitted.

Appendix—Docket Entries.

2314 October Term, 1978

COMMONWEALTH OF PENNSYLVANIA,

v.

FREDERICK RUTH,

Appellant.

Berks County Ct. House, Reading, Pa. 19601, 1(215)375-6121.

(Violating the controlled substance, drug, device and cosmetic act; possession with intent to deliver, delivery of a controlled substance and possession of a controlled substance; the controlled substance being amphetamines.)

August 29, 1978—Appeal from the Judgment of Sentence imposed August 25, 1978, of the Court of Common Pleas, CRIMINAL, for the County of BERKS, at No. 76-128001.

August 30, 1978—NOTICE OF APPEAL DOCKETED.

October 10, 1978—Praecipe for Withdrawal of Appearance of Oscar N. Gaskins, Esq., and Appearance of Lee Mandell, Esq. for Appellant, filed.

December 18, 1978—Record, 1 part filed.

January 18, 1979—Petition for Additional Time Within Which to Submit Briefs for Appellant, filed.

ORDER

AND NOW, January 26, 1979, the time within which Appellant shall file briefs is extended to February 25, 1979. *Per Curiam.*

May 7, 1979—Appellant's Petition for Continuance of Argument, filed.

ORDER

AND NOW, May 10, 1979, Petition for Continuance of Argument is DENIED. *Per Curiam.*

June 18, 1979—Listed for June, 1979 Session at Philadelphia. Argued (J-948).

DECISION

December 7, 1979—Judgment of Sentence Affirmed. *Per Curiam.*

December 7, 1979—Order entered.

January 4, 1980—Petition for Allowance of Appeal filed at No. 11 E.D. Misc. Docket, 1980.

January 7, 1980—Record exit to Supreme Court.

April 14, 1980—Petition DENIED.

Order of Supreme Court

SUPREME COURT OF PENNSYLVANIA
Eastern District

Sally Mrvos
Prothonotary
Catherine E. Lyden
Deputy Prothonotary

456 City Hall
Philadelphia, 19107
(215) 686-3581-84

April 14, 1980

Lee Mandell, Esq.
1525 Robinson Building
42 S. 15th Street
Phila., Pa. 19102

In re: Commonwealth of Pennsylvania v.
Frederick Ruth, Petitioner.
No. 11 E.D. Misc. Docket 1980

Dear Mr. Mandell:

This is to advise you that on April 14, 1980 the Supreme Court entered its Order denying the Petition for Allowance of Appeal in the above-captioned matter.

Very truly yours,

SALLY MRVOS
Sally Mrvos
Prothonotary

SM:mb

CC: Office of District Attorney, Berks County

Memorandum Opinion of the Court of Common Pleas

IN THE COURT OF COMMON PLEAS
of Berks County, Pennsylvania

COMMONWEALTH OF PENNSYLVANIA,

v.

FREDERICK RUTH,

Defendant.

Criminal Division
No. 76128001

MEMORANDUM OPINION, SCHAEFFER, *J.*,
December 7, 1978.

The defendant, Frederick Ruth, was charged and convicted before a judge and jury of conspiracy to commit the crime of possession of a Schedule I controlled substance, to wit, heroin, with intent to deliver. The facts of the case construed most favorably to the Commonwealth, the verdict winner, established that one Judy Bilansky, an undercover deputy sheriff, working with the Reading City Police Department Vice Squad and the Bureau of Drug Control, on May 1, 1976, was driving an automobile in the vicinity of Front and Buttonwood Streets in the City of Reading at approximately 5:00 p.m. Her purpose in going there was to meet, by prearrangement, an Hispanic male known to her as "Eddie." Detective Frank Delewski of the Reading City Police, and Agent Phoebe Teichert of the Bureau of Drug Con-

trol, were in a second car driving in front of Sheriff Bilansky. At this time, Sheriff Bilansky noticed a green Cadillac automobile following very closely behind her and noticed her acquaintance, the Hispanic male known to her as "Eddie", motioning to her to stop. Sheriff Bilansky did stop and "Eddie" got out of the right front passenger's seat of the green Cadillac, came over to Sheriff Bilansky's car, got into it, and directed Sheriff Bilansky to drive until he would tell her to stop. Sheriff Bilansky did as "Eddie" instructed her and drove to the 300 block of Front Street where "Eddie" directed her to pull over and park in a parking space along the curb. Sheriff Bilansky saw the green Cadillac pull in and park along the curb directly behind her car. By coincidence, the car in which Detective Delewski and Agent Teichert were riding was parked along the curb of Front Street directly in front of where "Eddie" had directed Sheriff Bilansky to park her car. While Sheriff Bilansky and "Eddie" were engaging in a conversation, the defendant walked up to Sheriff Bilansky's car and talked to Sheriff Bilansky through the open window of the driver's side. The defendant asked Mrs. Bilansky her name and then said to her, "I hear that you are from Kutztown." Sheriff Bilansky answered, "Yes" and the defendant said, "It's funny. I have never seen you before." Sheriff Bilansky answered, "I have never seen you either." The defendant then asked Sheriff Bilansky a lot of additional questions and demanded to see Sheriff Bilansky's driver's license. At this point Sheriff Bilansky said to the defendant, "What is this, a bust? Are you a cop? Are you going to bust me? You can see my driver's license. The next thing

you want me to come out of the car with my hands on top of my head." The defendant then said, "Don't be ridiculous. I'm the one that brought your dope here. I'm the one that brought his ass here to meet you." At the same time that the defendant was having this conversation with Sheriff Bilansky, "Eddie" was sitting to Sheriff Bilansky's right on the passenger's side of Sheriff Bilansky's car and in full view of Sheriff Bilansky was preparing tin foil packets. "Eddie" then gave the tin foil packets to Sheriff Bilansky and Sheriff Bilansky paid "Eddie" $200.00 in United States currency for the packets. The defendant then returned to the green Cadillac, and Sheriff Bilansky drove off and returned to the Bureau of Drug Control Office in Reading. An analysis of the contents of the tin foil packages which "Eddie" had delivered to Sheriff Bilansky in the defendant's presence established that these packets contained heroin.

The defendant filed timely motions for a new trial raising the following issues:

(a) The verdict was against the weight of the evidence;

(b) The verdict was against the sufficiency of the evidence;

(c) The verdict was contrary to the law;

(d) The verdict was based upon evidence improperly admitted at trial;

(e) The verdict was against both the evidence and the law;

(f) The verdict is the result of the denial of motions for a mistrial.

These are the only issues raised by defendant in his post-trial motions and are the only matters before the court at this time.

The elements of the crime of possession of a controlled substance with intent to deliver are as follows:

1) That the actor possessed a controlled substance, in this case, heroin; and

2) That the actor possessed the substance with intent to deliver.

For a person to possess a controlled substance he must have the power to control and the intent to control that substance. The actor must know that he has the substance and he must know what it is. The term "intent to deliver" includes the intent of a person to make an actual transfer from himself to another person of a controlled substance.

The evidence clearly establishes that "Eddie" possessed heroin, a controlled substance, and that he delivered it to Sheriff Bilansky. Therefore, the jury could properly infer that "Eddie" had the heroin in his possession with the intent to deliver it. The jury could also infer from the facts established in this case that "Eddie" knew the substance was heroin.

No evidence was introduced to establish that "Eddie" and/or the defendant were not registered to possess and deliver heroin. If defendant's or "Eddie's" failure to be

registered is an element of the offense of possession of heroin with intent to deliver, then the Commonwealth has failed to establish that "Eddie's" act in possessing heroin with intent to deliver was a crime, and the defendant cannot be guilty of conspiracy since conspiracy requires an agreement to commit a *crime*.

We find, however, that failure to be registered to possess and deliver heroin is not an essential element of the offense of possession of heroin with intent to deliver. We are aware that the Superior Court in *Commonwealth v. Sojourner*, No. 2387 October Term, 1976 (not yet reported), a 3-2 decision handed down July 12, 1978, held that not being registered was an essential element of the offense and that the Commonwealth had to establish the defendant was not registered. However, this decision is not a decision by a majority of the seven-man court, and in light of *Commonwealth v. Driscoll*, No. 29 April Term, 1978, handed down *July 14, 1978*, is not controlling.

In *Commonwealth v. Driscoll, supra*, the defendant was convicted of Possession with Intent to Deliver, Delivery of, and Possession of, a Controlled Substance, amphetamines. The Commonwealth offered no evidence to establish that defendant was "not registered" under the law. Defendant raised and argued before the lower court that the Commonwealth was compelled to prove the defendant was not registered. The lower court held the Commonwealth need not prove non-registration, even when the indictment charged non-registration.[1] On appeal

[1] Commonwealth v. Driscoll, CC7503838A, Court of Common Pleas of Allegheny County. The Opinion of Judge Dauer in that case is unreported. A copy of that opinion is, therefore, attached as an addendum to this opinion.

the Superior Court affirmed *per curiam*, with only Judge Hoffman dissenting. Since *Driscoll* was decided two days *after Sojourner*, and since Driscoll in an opinion by the full bench of the Superior Court, we find it controlling.

We understand that *Sojourner* is presently before the Superior Court after re-argument and that *Driscoll* is presently on appeal before the Supreme Court and that allocatur has been granted. Therefore, we may have a reinterpretation of the law in this area in the near future. But until we do, we hold that *Driscoll*, not *Sojourner*, controls.

Conspiracy requires an agreement between at least two persons. In order for a person to be guilty of conspiracy to commit a crime, the following two elements must be established:

1) That the actor agreed with another person that they would engage in conduct which constitutes a crime, in this case, the crime of possession of heroin with intent to deliver.

2) That the actor entered into this agreement with the intent of promoting or facilitating the commission of the crime.

In addition, it is required that an overt act be committed in pursuance of the conspiracy, done by either the actor himself or by a person with whom he conspired. The overt act must be performed after the conspiracy comes into existence. An overt act is the taking of a step toward the commission of the crime which is the object of the conspiracy.

In the case at bar, the jury could properly infer that the defendant had entered into an agreement with "Eddie" and in accordance with that agreement, "Eddie" would possess heroin with intent to deliver it. The jury could properly find that "Eddie", in actually delivering the heroin to Sheriff Bilansky, committed an overt act. There was, therefore, ample evidence to sustain the jury's verdict that the defendant, Frederick Ruth, was guilty of conspiracy to possess heroin with intent to deliver.

It is not necessary that "Eddie" be convicted of conspiracy. If one conspirator is not yet indicted or for some reason has not yet been tried, there is no bar to the conviction of the other, in this case, of the defendant. *Commonwealth v. Campbell*, _____ Pa. Super. _____, 390 A.2d 761 (1978); *Commonwealth v. Hunter*, 240 Pa. Super. 23, 360 A.2d 706 (1976); *Commonwealth v. Salerno*, 179 Pa. Super. 13, 116 A.2d 87 (1955).

Therefore, the verdict in the case at bar was proper and the defendant's contentions that the verdict was against the weight of the evidence, that the verdict was against the sufficiency of the evidence, that the verdict was contrary to law, and that the verdict was against both the evidence and the law, are without merit.

FRANK G. SCHAEFFER,
J.

***Per Curiam* Order of the Superior Court of Pennsylvania**

IN THE SUPERIOR COURT OF PENNSYLVANIA
Philadelphia District

No. 2314 October Term, 1978

COMMONWEALTH OF PENNSYLVANIA,

v.

FREDERICK RUTH,

Appellant.

Appeal from the Judgment of Sentence Imposed August 25, 1978 of the Court of Common Pleas, Criminal, for the County of Berks, at No. 76-128001.

Before: HESTER, HOFFMAN, and CATANIA, *JJ.*

PER CURIAM:

Judgment of Sentence Affirmed.

Filed Dec 7 1979

Judgment

IN THE SUPERIOR COURT OF PENNSYLVANIA
Philadelphia District

No. 2314 October Term, 1978

COMMONWEALTH OF PENNSYLVANIA,

vs.

FREDERICK RUTH,

Appellant.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of BERKS County be, and the same is hereby AFFIRMED.

BY THE COURT:

J. HANIEL HENRY,
J. Haniel Henry,
Prothonotary.

Dated: December 7, 1979

Memorandum Opinion

IN THE SUPERIOR COURT OF PENNSYLVANIA
Philadelphia District

No. 2314 October Term, 1978

COMMONWEALTH OF PENNSYLVANIA,

v.

FREDERICK RUTH,

Appellant.

Appeal from the Judgment of Sentence Imposed August 25, 1978, of the Court of Common Pleas, Criminal, for the County of Berks, at No. 76-128001

Before: HESTER, HOFFMAN and CATANIA, *JJ.*

OPINION BY: CATANIA, *J.*

The appellant was arrested on May 1, 1976, and charged with conspiracy to commit the crime of possession of a schedule one controlled substance, to wit, heroin, with intent to deliver. On March 22, the defendant was brought to trial and subsequently found guilty before a jury of this charge. The facts of the case, in brief, are as follows:

Judy Bilansky, an undercover deputy sheriff, working with the Reading City Police Department Vice Squad and the Bureau of Drug Control, after having received a phone call from an informant known only to her as "Ed-

die", drove her automobile into a prearranged area and met with "Eddie" and the defendant. After a verbal exchange, the person known to Sheriff Bilansky as "Eddie" delivered to Sheriff Bilansky, eight packets of a white powder subsequently identified as heroin. Sheriff Bilansky paid "Eddie" two hundred dollars ($200.00) for the packets. Sheriff Bilansky testified to a statement made by the defendant to her as follows:

> "Don't be ridiculous. I'm the one that brought your dope here. I'm the one that brought his ass here to meet you."

The defendant has assigned four points of error during his trial and has requested that this Court grant to him a new trial. The first point of error is that the appellant was denied the effective assistance of counsel by the failure of trial counsel to allege as error, in post trial motions, the failure of a trial court to charge the jury that presence at the scene of a crime and knowledge of its commission, alone, is insufficient to convict of conspiracy. The second point of error which is alleged by the defendant is that trial court erred in not sustaining the appellant's demurrer to the charge of conspiracy. It is first of all pointed out by the district attorney that the defendant elected to put in a case on defense and therefore the question of the correctness of a ruling on demurrer is no longer an available issue. *CF. Commonwealth v. Ilgenfritz*, 353 A.2d 387 (1976). However, in *Ilgenfritz*, the Supreme Court chose to treat this question with reference to appellant as a motion in arrest of judgment and stated that the test of sufficiency of evidence is whether accepting as true all the evidence,

together with all reasonable inferences therefrom, upon which the jury could properly base its verdict, such evidence and inferences are sufficient in law to prove guilt beyond a reasonable doubt. We have considered the evidence and we believe that the evidence is quite sufficient to convict the defendant. Therefore, we will not overrule the decision of the lower court in this regard. Further, we believe that the evidence of conspiracy is quite clear in that there was a definite agreement to sell heroin, that the defendant possessed that substance, and that he acted with an intent to deliver it, in fact, he did deliver it. Although the co-conspirator, "Eddie", was the one who physically handed the heroin to Sheriff Bilansky, it is quite clear that the defendant was involved in this transaction and therefore guilty of conspiracy. With regard to defendant's allegation of error, we have read the charge of the lower court and we are satisfied that this charge was sufficient. It is true that the lower court did not read the exact charge requested by the defendant and it is further true that the charge was a proper and correct statement of the law. However, a trial judge is not required to accept a requested instruction verbatim. The trial court is free to select its own form of expression so long as the issue is adequate, accurately and clearly presented to the jury. *CF. Commonwealth v. Gardner*, 371 A.2d 986 (1977).

The third issue presented in this appeal is whether or not the evidence was insufficient as a matter of law to support a conviction of conspiracy. In this regard, the defendant relies on the decision in *Commonwealth v. Sojourner*, decided July 12, 1978 by a three to two decision

in this Court. That decision held that non-registration was an essential element of the offense of possession with intent to deliver heroin. More particularly, that decision stated that the Commonwealth had the burden of proof and that the Commonwealth must prove that the defendant was not registered to sell the controlled substance. *Commonwealth v. Sojourner* was reargued before the Court *en banc* and an Opinion was written by President Judge Cercone, which was filed on June 22, 1979. In this second *Sojourner* decision, our Court held as follows:

> "The next question is whether the Commonwealth has the burden of proving 'non-authorization' beyond a reasonable doubt in every case setting; that is, stated conversely, whether we should allocate to the defendant the burden of coming forward with some evidence of authorization sufficient to activate the risk of non-persuasion for the Commonwealth in a particular case. The Commonwealth has suggested this as an alternative argument in this case and, for the reasons which follow, we find it to be an imminently superior one."

We will not restate the reasons as set forth in *Sojourner*. We note that the defendant in this lower court case did not come forth with any such evidence and the Commonwealth therefore was not required to prove non-registration. Therefore, in reliance upon the second *Sojourner* decision, we overruled this allegation or error.

The final point argued by the defendant is that the trial court erred in failing to sustain the appellant's objection to the admissability into evidence of certain physical evidence: to wit, certain elicit drugs. The

evidence in the case is quite clear that the heroin was delivered to the police crime lab and that it was marked, placed in bags, and the bags were stapled. The head of the lab stated that there were five technicians and a secretary who worked in that lab and that yes it would be possible that somebody could go in and change it but obviously not probable. There is no requirement that the Commonwealth establish the sanctity of its exhibits beyond all moral certainty. It is sufficient that the evidence establish a reasonable inference that the identity and condition of the exhibits remained unimpaired until they were surrendered to the Court. *Commonwealth v. Miller*, 339 A.2d 573 (1975); *Commonwealth v. Jenkins*, 332 A.2d 490 (1974). A review of the transcripts in this matter makes it quite clear that although there may have been some possibility of access the Commonwealth has clearly established that the exhibits were not tampered with and that the heroin was the substance sold to Sheriff Bilansky.

Judgment of sentence affirmed.